

ENVIRONMENT

Judicial review challenging Pest Management Regulatory Agency (PMRA) decision amending certain registrations for pest control product following re-evaluation under *Pest Control Products Act*, S.C. 2002, c. 28, s. 16 — Specifically, applicants challenging portion of decision that provides 24-month transition period for implementation of risk mitigation measures required by these amendments — Applicants seeking order: (a) declaring that PMRA lacking jurisdiction to provide transition period in decision; (b) declaring that PMRA's practice of providing transition period in connection with amendments, pursuant to PMRA "Policy on Cancellations and Amendments Following Re-evaluation and Special Review" *ultra vires* Act; (c) quashing transition period in decision — Applicants all non-governmental organizations that engage in environmental advocacy — Respondent Minister of Health delegated responsibility of Act to PMRA; respondent Syngenta Canada Inc, registrant of neonicotinoid pest control product Thiamethoxam Technical Active (TMX), 17 associated end-use products in which TMX active ingredient — Products include sprays to be applied to plants, bare soil — Act governing regulation of pest control products in Canada, including both active ingredients, their end-use commercial applications — Subject to certain exceptions, Act, s. 6(1) prohibiting person from manufacturing, possessing, handling, storing, transporting, using, etc. pest control product not registered under Act — For product to be registered, or for existing registration to be amended, application must be made to Minister, who then conducts evaluation considered necessary regarding health or environmental risks in particular (Act, ss. 7(1), (3)) — Before events giving rise to present judicial review, TMX products registered under Act by PMRA — In June 2012, PMRA giving notice that initiating re-evaluation of TMX in light of emerging science on neonicotinoids, their potential effects on pollinators — After such re-evaluation, PMRA published results in proposed decision in 2017 — After release of proposed decision, consultation period with various stakeholders taking place — PMRA then issuing final decision which is subject of judicial review — Application seeking relief not only against decision but also in relation to portion of Policy referenced, relied upon in decision — Main issues: whether PMRA lacking authority to provide transition period in connection with amendments following re-evaluation where requirements of Act, s. 21(3) not met; if PMRA having such authority, whether PMRA nevertheless committing reviewable error in providing transition period in decision through either adoption or application of test for acceptable risk employed in Decision — Act's primary purpose set out in s. 4(1), which is to prevent unacceptable risks to individuals, environment from use of pest control products, considered — PMRA's interpretation of Act, conferring upon it authority to introduce transition period in connection with amendment, not conflicting with Act's purpose, principles of purposive statutory interpretation not representing "knock-out punch"¹ of sort described in *Mason v. Canada (Citizenship and Immigration)*, 2019 FC 1251 — PMRA concluding in decision that, overall, risk to pollinators acceptable over time period required to implement mitigation measures that were subject of amendment, that taking into account effect amendment would have upon growers, transition period would allow for orderly, safe implementation of these measures — Act, s. 21(2)(a), provision at issue here, assessed — Act, s. 21(2)(a) employing concept of acceptable risks, which invokes meaning prescribed by Act, s. 2(2), that health or environmental risks acceptable if there is reasonable certainty that no harm to human health, future generations, or environment will result from exposure to or use of product, taking into account its conditions or proposed conditions of registration — Term "harm" employed in some definitions in Act, s. 2(2), not itself defined — Respondents' arguments that expression "no harm" as found in s. 2(2) cannot be interpreted as meaning

¹ In *Mason*, Justice Grammond uses the language of a "knock-out punch" to refer to a statutory interpretation argument that is internally consistent, that withstands scrutiny, and that is not met by an argument of similar force.

no harm to any individual organism in environment; that it was open to PMRA to interpret Act as requiring more than risk of any harm to individual bees to find that risk was unacceptable, agreed with — Respondents' statutory interpretation available interpretation within range of outcomes contemplated by reasonableness standard of review — Such interpretation underpinning of PMRA's conclusion that risks during transition period acceptable — PMRA's analysis in decision indicating that PMRA interpreted "no harm" standard prescribed by Act as focusing upon pollinator populations rather than upon individual members or subsets thereof — Given logic of respondents' statutory interpretation argument, language of Act, s. 21(2)(a), considered in conjunction with other provisions directly applicable to its meaning, not representing "knock-out punch" undermining reasonableness of PMRA's interpretation of its authority — In concluding that risk to pollinators will be acceptable over time period required to implement mitigation measures in decision, PMRA clearly considered its conclusion to satisfy requirements of Act, s. 21(2)(a) — PMRA's interpretation constituting available interpretation of language in Act, s. 21(2)(a), as informed by s. 2(2), that there can be temporal component to condition of registration — Doctrine of jurisdiction by necessary implication argument addressed — Parties' respective arguments in relation to this doctrine focussed principally upon labeling requirements resulting from amendment to registration of pest control product — Such doctrine applying in this case — Apparent from decision, Policy at issue that PMRA regarded transition period as necessary to fulfil its mandate in connection with amended registration — Practical necessities of PMRA's re-evaluation process, considered in context of doctrine of jurisdiction by necessary implication, representing argument favouring interpretation of its authority PMRA adopted — Context afforded by Act, s. 21(5)(a), which affords Minister express authority to introduce measures of transitional nature but only following cancellation, strongly favouring respondents' position in defence of reasonableness of PMRA's interpretation of its statutory authority — After several arguments considered, conclusion made that PMRA's interpretation reasonable, should not be disturbed on judicial review — Conclusion applying to PMRA's reliance upon that interpretation both in support of decision, in adopting Policy — Finally, PMRA not committing reviewable error in providing transition period in decision, through either its adoption or its application of test for acceptable risk employed in decision — Particular transition period length adopted by PMRA not representing basis to challenge reasonableness of re-evaluation decision in absence of error in PMRA's assessment of acceptable risk — PMRA applying applicable test reasonably concluded, taking into account transition period it adopted, that amendment rendered risk to pollinators acceptable — Therefore, no basis for Court to interfere with decision — Application dismissed.

DAVID SUZUKI FOUNDATION V. CANADA (HEALTH) (T-784-19, 2019 FC 1637, Southcott J., reasons for judgment dated December 18, 2019, 81 pp.)